This Bill of Exceptions presented an *inherently Constitutional and Federal question.* The Fifth Amendment did not have to be named for the trial court. See *New York v. Zimmerman*, 278 U.S. 63 and *Braniff v. Nebraska*, 347 U.S. 590, and *Tompkins v. Missouri*, 323 U.S. 485.

The Constitutional question so presented was raised by Bill of Exceptions No. 1 in the Trial Court and at the very opening of the trial. The question was carried forward on appeal as the Fifth Point of Error.

Reasons for Granting the Writ

The Courts below have denied Petitioners any relief. The effect is to destroy Petitioners' property without allowing any compensation.

Such holdings conflict with the decisions of the Supreme Court of the United States as follows:

The importance of the question is paramount in the whole of the United States. The Court judicially knows that the eminent domain process is daily being invoked by public authorities throughout our land. The hosts of the Nation's property owners who have apartment houses, commercial buildings, and other structures which contain furniture cannot be counted. The courts have long had trouble with granting "removal costs" as being too incidental to a "taking." The courts below have allowed such "incidental loss" philosophy to affect Petitioners here, who complain not merely of indirect damage, but of what amounts to an actual taking of their personal property.

The constitutional principles are fundamental. The mere statement of the case ought to argue it sufficiently.

These principles are recognized by the Court in *United States v. General Motors*, 323 U.S. 373. We respectfully ask that the Opinion in the latter case be reviewed.

Petitioners' Bill of Exception No. 1, carried on page 55 of the Transcript, reads as follows:

> "BE IT REMEMBERED that upon trial of the above entitled and numbered cause held in the County Court in Travis County, Texas; beginning September 20, 1960, the following proceedings were had, to all of which, as noted, defendants duly made their exceptions and duly made and presented and there is hereby allowed, a Bill of Exceptions with respect thereto.
>
> "Defendants offered to testify, and if permitted, each of them would have testified, that the apartments in question contained furniture and movable items, of a kind appropriate to a furnished apartment house of a reasonable value in excess of $15,000.00, and would have further testified that by reason of having to move such out of the apartment house on account of the condemnation, such furniture and movable items became of little, if any value, and worth not more than $2,500.00. This offer, on objection, was refused."

It is elementary that the facts stated in the above Bill of Exception must be accepted as true on this appeal. *Avocato vs. Dell'Ara* 57 S.W. 296, 77 S.W.

47, writ of error denied; *Stokes vs. Temple Trust Company*, 59 S.W. (2) 849; *Teague Sewer Co. vs. Benbrook*, 38 S. W. (2) 845; *Waggoner vs. Davis*, 261 S.W. 482.

On this appeal, therefore, the record undisputedly shows damage in the sum of $12,500 to Petitioner's property; yet the judgments of the trial court, the Court of Civil Appeals, and the Supreme Court deny any recovery.

We seek recovery in this case not of lost profits or incidental removal expenses, but restitution for the *direct depreciation in value* of personal property. We are therefore within the class of consequential-injury actions in which The Supreme Court of Texas has indicated it would approve recovery of damages as constitutionally guaranteed.

In 1913, Justice Phillips, in the famous case of *Ft. Worth Improvement District No. 1 vs. City of Ft. Worth*, 106 Tex. 148, 158 S.W. 164 (a case of damage caused by flooding) quoted from the opinion of Justice Miller in the case of Pumpelly vs. Green Bay Company, 13 Wall. 166, 20 L. Ed. 557, to the effect that it would be a very curious and unsatisfactory result if in construing a provision of constitutional law, compensation would be awarded for direct taking of property and not for consequential injuries to property where its value is in effect seriously injured or destroyed. The language is:

"Such a construction would pervert the constitutional provision into a restriction upon the

rights of the citizens as those rights stood at the common law, instead of the Government and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

We respectfully say unto the Court that diligent search has failed to reveal any case in Texas, or elsewhere, which justifies the position taken by the State in this case with reference to personal property. The cases are conveniently collected in 69 A.L.R. (2d) 1453, 4 L.R.A. (N.S.) 890 and 67 Yale Law Journal, page 61. It is true that the writers say that the majority of jurisdictions do not allow recovery for consequential injury to personal property or the cost of removing personal property. The Court in examining the cases cited in these annotations, however, will see that such rules generally are laid down in jurisdictions where the constitutions are not as broad as the Constitution of Texas. Nearly all of the cases cited by the annotations referred to, in favor of the so-called "majority" rule, are cases where the applicable constitution restricted liability to that for a mere "taking." Even so, these cases have been soundly criticized as illogical and senseless. 67 Yale Law Journal 61. They are the product of the old road laws, built up when the mere condemnation of property *involved no consequential injury*, and when condemnations generally involved more or less a benefit to the property owners involved. (See 67 Yale Law Journal 61).

When the courts have really applied themselves to the problem at hand, they have generally held as

the Wootens contend it should be held in this case. See *Blincoe vs. C. O. & W. Ry. Co.* 16 Okla. 286, 83 Pac. 903, 4 L.R.A (N.S.) 890. 8 Ann Cas. 689 (1905). In that case, the condemnor by taking the property had put the landowner to the expense of removing a stock of lumber then on hand. The question was whether the cost of removal could be recovered. Holding that this cost could be recovered, being substantial and an obvious proximate result of the taking, the court said of the contention that compensation should not be allowed:

> "If this shall be held to be the law then the constitutional provision—'nor shall property be taken for public use without just compensation' becomes almost as much a sword as a shield to the private citizen, for the compulsory addition to the cost of the personal property of the citizen is as much a taking as the absorption of the real estate itself. Nor is this conclusion relieved or its results modified to the citizen by the fact that the agency thus arbitrarily adding to the cost of his property, can not carry on the business in which he is engaged. The result to the citizen in this case is the same whether the railroad company is benefited by the expenditure or not."

Recognizing the terrible injustice, as well as the wholly senseless departure from logic, in denying recovery for damage to personal property caused by real estate condemnations an enlightened court in Florida has lately held for the position now taken by the Wootens:

In *Jacksonville Expressway Authority vs. Henry G. DuPree Company*, 108 So. (2d) 289, 69 A.L.R. (2d) 1445, the Florida Supreme Court in 1958 carefully reviewed the so-called "majority rule," carefully reviewed such authorities as Orgel and Nichols, then looked to its constitution which required "full compensation" and held there was no good reason for saying that damages sustained in the removing of personal property were either speculative, or that the damage sustained by the "willing seller" would be offset by those suffered by the "willing buyer." Drew, J., in concurring specially said:

> "Many situations could arise where the cost of removal of the personal property would greatly exceed the value of the lands taken. Lands upon which scrap iron, old automobiles, heavy building materials and things of that nature stored are usually in remote and undesirable areas where land values are extremely low. It was never intended that the sovereign could place on the shoulders of an individual the burden of paying out his own money in order that the public could use his property against his will.
>
> "The fact that the sovereign is now engaged in great public enterprises, necessitating the acquisition of large amounts of private property at greatly increasing costs, is no reason to depart from the firmly established principle that under our system, the rights of the individual are matters of the greatest concern to the court. The powerful government can usually take care of itself; when the court cases to protect the individual—within, of course,

constitutional and statutory limits—such individual rights will be rapidly swallowed up and disappear in the law of the sovereign. If these immense acquisitions of land point to anything, it is to the continuing necessity of the courts in seeing to it, that in the process of improving the general welfare, individual rights are not completely destroyed."

The Honorable Supreme Court will notice that the Wootens do not ask here for "removal" costs. Their bill of exceptions (Tr. 55) was an offer of proof of direct damage to the personal property itself. The bill of exceptions states that the furniture, used as it was in the apartment house taken away, was depreciated in value because it was required to be removed by the condemnation. In other words, the evidence before the court on the bill of exceptions was that the personal property itself was directly damaged and directly depreciated.

Therefore, we are not seeking recovery for a mere consequential injury here, but we are seeking recovery for a direct injury.

The courts in other jurisdictions which have set up the so-called majority rule also hold that if fixtures are involved as distinguished from mere personal property, then their removal costs may be allowed. See 67 Yale Law Journal 61. Obviously there can be no intellectually honest basis for this distinction. Furthermore, the so-called "minority" may be considered better authority than the so-

called "majority." We have cited one Oklahoma case *Blinco v. C. O. & W.*, 83 Pac. 903) supporting the position taken by the Wootens. Another by the Oklahoma court is Oil Fields and *S. F. Ry. vs. Treese Cotton Company*, 78 Okla. 25, 187 Pac. 201. The Virginia court held with the position taken by the Wootens in *City of Richmond vs. Williams*, 144 Va. 698 77 S.E. 492. The Illinois courts, the Massachusetts Courts, the Pennsylvania Courts and the Connecticut courts seem to support our view. See *C. M. and S. T. P. Ry. Co. vs. Hock*, 118 Ill. 587, 9 N.E. 295; *Patterson vs. Boston*, 23 Pick (40 Mass.) 425 (1840); *St. Louis Etc. R. R. Co. vs. Capps*, 67 Ill. 607 (1872); *A. T. & S. F. Ry. Co. vs. Schneider*, 127 Ill. 144, 20 N.E. 41, 2 L.R.A. 422 (1889); *Millon Printg. Cl. vs. Pittsburg, C. & W. R. Co.* 216 Pa. 504, 65 A. 1091; *Harvey Textile Co. vs. Hill*, 135 Conn. 686; 67 A. (2d) 851 (1949).

Likewise, the Michigan court seems to be coming towards the view we now urge. *See In Re, Stum Clearance of Detroit*, 332 Mich. 185; 52 N.W. (2d) 195. (In this case the Michigan court held that chemical solutions and molten metals used by an electrolytic plating company were "fixtures," and being "fixtures" the cost of their removal or replacement should be allowed.)

Conclusion

For the foregoing reasons the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Coleman Gay
Capital National Bank Bldg.
Austin, Texas

David L. Tisinger
1210 Capital National Bank Bldg.
Austin, Texas

Counsel for Petitioners
Greenwood S. Wooten, et al.

Appendix A

Amendment 5 of the United States Constitution provides:

> "No person shall be held * * * nor shall private property be taken for public use, without just compensation."

Article 1, Sec. 17 of the Texas Constitution says:

> "No person's property shall be taken, damaged or destroyed or applied to public use without adequate compensation being made, unless by the consent of such person."

APPENDIX B

Opinion of Court of Civil Appeals

The State of Texas, acting by and through the State Building Commission sued to condemn 6,041 square feet of land near the State Capitol for use as a site for The Texas Supreme Court Biuding. The owners of this property were appellants, Greenwood S. Wooten and wife, Nina Belle Wooten.

The case was tried to a jury, the only issue submitted to it being one as to the value of the property condemned.

Appellants' first point is that the Trial Court erred in refusing to receive in evidence photographs of the interior of an apartment house located on the property in suit, and their fourth point is that the Court erred in receiving in evidence photographs of the interior of this building offered by the State and taken after such building had been vacated and its furnishings removed.

The pictures offered by appellants show the apartments depicted to be beautifully furnished, one picture bing in color.

The pictures offered by the State and admitted show the apartment to be vacant and unfurnished. The blinds and drapes are gone, as is one commode seat, and there is litter on the floor.

For its authority See Art. III, Sec. 51-b, Texas Constitution, Art. 678m, V.A.C.S.

In Taylor v. City of Austin, 291 S.W. 2d 399, writ ref., N.R.E., a condemnation suit, we held that photographs of the interior of a house on the property which prominently displayed furniture was properly excluded from evidence. Our ruling is the same here.

Appellants say that the pictures excluded "were not mainly displays of furniture, but were photographs of the interior of the building and showed susceptibility of use."

There was no dispute that the apartments, and the building, were suceptible to use for apartment dwelling.

We will not quibble over the question of whether or not the pictures were mainly displays of furniture. If these were the only pictures of the interior of the building, we might treat the question more seriously. There were the pictures offered by the State, and admitted.

It is a trivial objection to these pictures to say that one shows a commode seat missing, and the other shows litter on the floor. We cannot believe that the jury was mislead or in the least influenced by these small matters.

The second and third points of error complain of the exclusion from evidence of the written appraisals of the property made by appellants' expert value witnesses, Joe Crow and C. T. Uselton.

Directing our attention to the Crow appraisal, we find that when Mr. Crow was being cross examined he was interrogated about a statement furnished him by Mr. Wooten showing gross income from the apartment house during the year July 1955 to July 1956 to be $9,992.35. This figure was about $1500.00 in excess of the income as testified to by other witnesses.

The source of the $9,992.35 figure was Mr. Crow's written appraisal report. Counsel for the State read an excerpt from this report in questioning Mr. Crow about the income from the property and other matters.

Appellants complain that the whole report was not admitted in evidence when offered by them. They rely upon the rule (found in 45 Tex. Jur., Witnesses, Sec. 288, to the effect that when a witness is impeached he should be allowed to clear up a contradiction, and the rule found in 44 Tex. Jur., Witnesses, Sec. 175, to the effect that when part of a transaction only is shown on cross examination, the whole of such transaction may be shown on redirect examination provided it is revelant to the same subject brought out on cross examination.

The record shows that the use made by the State of the Crow appraisal was not for impeachment purposes but only to refresh the present memory of the witness Crow concerning the basis of his appraisal and evaluation of the property condemned. Mr. Crow understood this saying "I am refreshed." No part of the Crow appraisal was offered in evi-

dence by the State. When a memorandum is used for the purpose indicated, it is not admissible in evidence. Secs. 550, 554, Texas Law of Evidence, McCormick and Ray, 2d Ed.

Moreover, appellee, in its brief, states that "the witness Crow testified to practically every item in his apparisal report and there is nothing in the report which explains or qualifies the one statement read to the witness." Appellants do not refute this statement, and we accept it.

Turning now to the witness, Mr. C. T. Uselton, we find that on cross examination he was asked if he had made a written appraisal report. He answered "no". When shown the written report, he admitted his error.

On direct examination the witness had testified that he had not figured the value of the property from an income standpoint. When confronted with the written appraisal report, the witness stated that it showed the value of the property calculated from an income approach. This value was less than the value given by the witness on the trial.

The State offered no part of the appraisal report in evidence. Appellants offered it all in evidence.

The State could have offered in evidence, for impeachment purposes, that portion of the report which contradicted the testimony given by the witness on the trial. This was not required nor necessary since the witness testified to the verity of the conflicting evidence.

Appellants were entitled to introduce such portions of the written appraisal report which would explain or throw light upon the recitals in it which contradicted the estimony of the witness. Wichita Fall Motor Co. v. Meade, 203 S.W. 71, Amarillo Civil Appeals.

Appellants do not point to any portion of the report which falls within this rule and neither appellee nor we have been able to find in it any explanation of the contradictory statement which it contained.

Again, as concerning the Crow report, appellee states that the witness Uselton testified, in substance, to nearly everything contained in the report. Appellants do not reply to this statement, and we accept its correctness.

We are of the opinion that no error is reflected by these points; and that if there is error it is harmless under Rule 434, T.R.C.P.

Appellants' last point is that the Court erred in refusing to allow evidence of depreciation in value of the furniture in the apratment house on the condemned property.

Appellants offered to testify that the amount of this depreciation was $12,500.00.

Appellants state that the merits of this point have "been indirectly considered by this Court in prior cases and determinations made which were unfav-

orable." The cases referred to are State v. Vauhn, 319 S.W.2d 349 and State v. Parrish, 310 S.W. 2d 709, reversed on other points, 159 Tex. 306, 320 S. W. 2d 330.

The constitutional provision authorizing the present condemnation (Art. 1, Sec. 17, Texas Constitution) states, in part, that "no person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation . . ."

The furniture here was not taken. It could not possibly have been damaged by this condemnation suit. It is the same furniture and in the same condition now as it was before its removal from the condemned building, unless it has been damaged by someone other than the State.

It is not contended here that this furniture could not be used elsewhere, in fact the bill of exceptions states that it was ". . . of a kind appropriate to a furnished apartment house. . . ." This statement clearly precludes the notion that the value of this furniture is peculiarly related to its location in this particular apartment building.

It is our opinion that this point is not well taken under the facts and the cases cited.

No reversible error appearing, the judgment of the Trial Court is affirmed.

Robert G. Hughes, Associate Justice

Affirmed.
Filed: June 28, 1961.